

tickets for these CLECs will be omitted as well, compounding the impact on the Performance Measurements. Birch also determined that this problem is not tied to a particular timeframe or type of order, but “rather has occurred randomly over the past couple of years.”⁸⁴ Given the significant possibility that SWBT’s maintenance and repair data is distorted, the Commission should defer any finding as to SWBT’s performance in regard to maintenance and repair issues until the Texas Public Utility Commission has fully resolved the issue and determined the impact on the relevant metrics.

There have also been problems in regard to billing. Billing is a particularly important area for CLECs since customers demand the utmost in accuracy and timeliness in regard to their bills, particularly if they have just migrated from a long-term association with an ILEC. SWBT has missed the metric 17.01 (Billing Completeness) for twelve out of the sixteen months from August 1999 to December 2000.⁸⁵ SWBT did barely meet the metric in January and February of this year, but given the extended period of noncompliance in regard to the metric, a period of sustained compliance, longer than two months, should be required by the Commission in order to ensure that billing information is being provided at parity to CLECs.

⁸⁴ *Id.* at 2.

⁸⁵ *Staff November Comments* at 13; *Dysart Affidavit*, Attachment F at 4.

III. SWBT DOES NOT PROVIDE NON-DISCRIMINATORY PROVISIONING OF UNBUNDLED LOOPS IN COMPLIANCE WITH COMPETITIVE CHECKLIST ITEM NUMBER FOUR

A. Legal Standard

Section 271 requires a demonstration that the SWBT “is providing” and has “fully implemented” each item on the Competitive Checklist. In order to satisfy Item 4 of the Competitive Checklist, a BOC must show that the quality and timeliness of loops provisioned to CLECs is substantially the same for the BOC’s provision of its own retail advanced services or that the level of quality is sufficiently high so as to permit CLECs a meaningful opportunity to compete.⁸⁶ In addition to failing to meet many of the performance and parity standards set out within checklist Item No. 4, SWBT’s failure to provide access to unbundled DSL loops has hindered and, in many cases, prevented CLECs from having the opportunity to compete with SWBT on an equal footing.

B. Misplaced Reliance on ASI.

The Commenters initially note that SWBT’s reliance on the ordering and provisioning systems used by SBC Advanced Solutions Inc. (“ASI”) is misplaced.⁸⁷ As stated by the FCC in the Kansas/Oklahoma Order, SWBT’s advanced services separate affiliate is not useful in making a presumption of discriminatory performance since ASI has not been purchasing the same inputs used to provide advanced services as unaffiliated competing carriers.⁸⁸ ASI purchases either line sharing to provide ADSL service or intrastate special access, while CLECs usually purchase stand-alone DSL loops, BRI loops, and DS-1 loops to provide advanced

⁸⁶ *New York Order*, para. 335.

⁸⁷ *See generally* SWBT Application at 51-54.

services. Therefore, the Commission should reject SWBT's reliance on the ordering and provisioning used by ASI as demonstrating adequate provisioning to CLECs.

Moreover, even in the relatively few cases where CLECs attempt to use line sharing for DSL services, SWBT has failed to show parity between CLECs and ASI, such as PM 58-10 (Percentage of SWBT-Caused Missed Due Dates – DSL – Line Sharing).⁸⁹ SWBT explanation that it believes that some portion of this discrepancy between CLECs and ASI may be caused by the way that Miscellaneous Equipment ("ME") are assigned is not a satisfactory explanation. SWBT makes no claim that parity exists, it is rather weakly claiming that the problem may not be as bad as it appears. In addition, SWBT failed to prove parity for PM 65-09 (Trouble Report Rate – DSL – Line Sharing).

C. Deficiencies in Stand Alone Loop Provisioning.

With regard to stand-alone loops, SWBT has consistently failed to achieve benchmark performance in areas that are key to ensuring that CLECs are afforded a meaningful opportunity to compete. Specifically, SWBT has failed to achieve parity in several areas relating to the provision of loops as UNEs including: PM 28-06 (Percent Installation Within Customer Requested Due Date – No Field Work – UNEs); PM 29-06 (Percent SWBT Missed Due Dates – No Field Work – UNEs); PM 38-06 (Percent Missed Repair – UNEs – No Dispatch); and PM 41-03 (Percentage Repeat Reports – UNEs).

Equally disturbing is SWBT's performance in PM 60-08 (Percent Missed Due Dates Due to Lack of Facilities - DSL – No Line Sharing). SBC claims that its failure in this area is due in large part because the separate loops needed by CLECs to provide DSL service are not

⁸⁸ *Kansas/Oklahoma Order* n. 517.

⁸⁹ See Application at 59. SWBT failed to meet the parity standard for PM 58-10 (Percent SWBT- Caused Missed Due Dates – DSL – Line Sharing) during both January and February

immediately available or are in need of repair. SWBT contends that this “lack of facilities” should excuse it from having to meet the standards established by the Commission as a means to ensure competition. SWBT actually goes so far as to re-compute the percentages excluding situations in which the due date was missed due to its “lack of facilities.”⁹⁰ In order to compete effectively, CLECs need access to unbundled loops for DSL services. SWBT offers no justification for its “lack of facilities” or any explanation for why such situations should be excluded when evaluating SWBT’s performance.

SWBT’s failure to meet the standards established by the Commission in order to ensure that CLECs have a meaningful opportunity to compete is also apparent in its provisioning of BRI loops and DS1 loops. SWBT failed to achieve the benchmarks established for PM 56-03.1 (Percent Installed Within 3 Days – BRI Loops – 1-10 Loops) in two of the last three months. With respect to DS1 loops, SWBT has failed to meet the benchmark performance standards set for PM 55-04 (Average Installation Interval - DS1 Loops) and PM 56-04-1 (Percent Installed Within 3 Days – DS1 Loops – 1-10 Loops). SWBT fails to offer any explanation for its failure other than to state that it believes that the standards set are “rigorous” and that its failure should be looked at in comparison to the amount of time it takes to provide its own retail customers with DS1-Specials as indicated by the data for PM 43-04 (Average Installation Interval – DS1 Specials).⁹¹ SWBT is asking the Commission to compare apples and oranges in order to declare that parity exists. SWBT admits that most of its retail provisioning of DS1 circuits are purchased out of its access tariff and that the due dates on these retail customer requests are much longer. SWBT even attempts to use this difference in due dates to excuse its discrepancy between the

⁹⁰ See *Dysart Affidavit* at ¶ 64.

⁹¹ See *Dysart Affidavit* at ¶¶ 106-107.

service provided to CLECs and retail customers in PM 58-06 (Percent SWBT Caused Missed Due Dates – DS1 Loop with Test Access) citing that it is more difficult to meet a shorter time frame. SWBT can not have it both ways. The Commission should not accept SWBT’s argument that the provision of DS1-Specials to retail customers are similar enough to DS1 UNEs as to make a parity comparison under PM 55-04, but yet different enough so as to excuse the inconsistency between SWBT retail customers and CLECs in terms of PM 58-06. Regardless, SWBT’s failure to provide BRI Loops and DS1 Loops hinder CLECs ability to meaningfully compete.

D. SWBT’s Hot Cut Performance is Deficient

Section 271(c)(2)(B)(iv) of the Act, item 4 of the competitive checklist, requires that SBC provide “[l]ocal loop transmission from the central office to the customer’s premises, unbundled from local switching or other services.”⁹² In order to establish that it is providing unbundled local loops in compliance with section 271(c)(2)(B)(iv), SBC must demonstrate that it had a concrete and specific legal obligation to furnish loops and that it is currently doing so in the quantities that competitors reasonably demand and at an acceptable level of quality.⁹³

A vital facet of a BOC’s provisioning of unbundled loops is “the use of coordinated conversions of active customers” from the BOC to the competing carriers.⁹⁴ This process is known as a “hot cut” and entails manually disconnecting the customer’s loop in the BOC’s central office and reconnecting the loop at the competing carrier’s collocation space.⁹⁵ The

⁹² 47 U.S.C. § 271(c)(2)(B)(iv).

⁹³ *Bell Atlantic New York Order*, ¶ 269.

⁹⁴ *Bell Atlantic New York Order*, ¶ 291.

⁹⁵ *Bell Atlantic New York Order*, ¶ 291, fn. 925.

customer is taken out of service while the hot cut is in progress, thus, the “hot” in the cut.⁹⁶ It is critical that the hot cut is provisioned correctly with coordination between the BOC and the competing carrier because problems with the cutover could result in extended service disruptions for the customer.⁹⁷ For a competing carrier trying to convince a customer that its change from the incumbent to the competitor was the correct choice, it goes without saying that the shorter the service disruption the better.

SWBT provides for two hot cut processes, coordinated hot cuts (“CHC”) and frame due time (“FDT”).⁹⁸ SWBT may charge a premium if CLECs use the CHC process.⁹⁹ This Commission has heretofore declined to evaluate SWBT’s performance in regard to the FDT process because carriers have not yet relied on the process sufficiently.¹⁰⁰ The Commission will probably find that to be true in regard to Missouri as well.¹⁰¹ CLECs would like to be able to use the FDT process more because there is no premium charged for it and the CHC process requires more of their staff to be involved in the process.¹⁰² The FDT process, however, fails to provide an acceptable quality of service. AT&T conducted trials using the FDT process and the results were very poor. For instance, 66% of its FDT orders experienced outages. This led it to go back

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ CC Docket No. 00-65, February 14, 2000 U.S. Department of Justice Evaluation of SWBT Texas Application at 29. SBC uses two hot cut processes. One is fully coordinated hot cut (“CHC”) process which is to be used for conversions of orders of twenty or more lines. These orders are manually processed and require intensive coordination and communication between SBC and the CLEC. Thus, they are performed outside of normal business hours. FDT cuts are used for cuts of fewer than 20 lines and are performed during normal business hours since they can be processed without the manual intervention of SBC representatives. *Id.* at 27.

⁹⁹ *Id.*; 10/12 Tr. at 2653.

¹⁰⁰ *SBC KS/OK Order* at ¶ 201.

¹⁰¹ 10/12 Tr. at 2653-2654.

¹⁰² 10/12 Tr. at 2652.

to the more labor-intensive, costly CHC process. From August 2000 to February 2001, only 94.8% of hot cut orders of 10 lines or fewer using the FDT process were completed within an hour.¹⁰³ In December 2000, only 88.6% of the orders were completed on time.¹⁰⁴ The applicable benchmark for this metric was 100%.¹⁰⁵

Until the FDT process becomes more of a viable alternative, CLECs do not have a true ability to “freely choose” between the CHC and FDT process. Since the hot cut process is one that ILECs do not have to endure, the Commission should ensure that the process for CLECs is as seamless as possible. Making the FDT process a viable alternative for CLECs would help promote this end, but as long as the Commission declines to review SWBT’s performance in this area, SWBT has no incentive to improve the process. Accordingly, FDT performance should be made a part of checklist compliance. SWBT’s application should be denied for poor FDT performance.

¹⁰³ *Dysart Affidavit* at ¶ 117.

¹⁰⁴ *Dysart Affidavit*, Attachment H at 6.

¹⁰⁵ Under a change in the business rules, the benchmark for this metric, PM 114.1, is being reevaluated. Right now PM 114.1 is being used simply a diagnostic measure. *Dysart Affidavit* at ¶ 116, n. 54.

IV. GRANTING SWBT'S APPLICATION WOULD NOT BE IN THE PUBLIC INTEREST

SWBT is required to show that granting its application "is consistent with the public interest, convenience and necessity."¹⁰⁶ Thus, even if SWBT can build a case for checklist compliance through its M2A, it must still meet this separate standard. As this Commission has noted:

the public interest requirement is independent of the statutory checklist and, under normal canons of statutory construction, requires an independent determination. Thus, we view the public interest requirement as an opportunity to review the circumstances presented by the applications to ensure that no other relevant factors exist that would frustrate the congressional intent that markets be open, as required by the competitive checklist, and that entry will therefore serve the public interest as Congress expected. Among other things, we may review the local and long distance markets to ensure that there are not unusual circumstances that would make entry contrary to the public interest under the particular circumstances of these applications. Another factor that could be relevant to our analysis is whether we have sufficient assurance that markets will remain open after grant of the application. While no one factor is dispositive in this analysis, our overriding goal is to ensure that nothing undermines our conclusion, based on our analysis of checklist compliance, that markets are open to competition.¹⁰⁷

Thus, two main considerations in evaluating if granting the application is in the public interest are whether the Missouri market is open to competition, and whether it will remain open to competition.

SWBT bears the burden in its application before the Commission. As discussed below, the available statistics support the conclusion that there is no effective competition in Missouri and that SWBT maintains significant market power in the local market. The standard for the public interest is straightforward. If SWBT maintains significant market power in the local

¹⁰⁶ 47 U.S.C. § 271(d)(3)(C).

¹⁰⁷ *SBC KS/OK Order* at ¶ 267.

market, it is not in the public interest to allow SWBT into the long distance market (even if the requirements of the competitive checklist are met).¹⁰⁸ Under these circumstances, the Commission must either defer SWBT's entry until competition develops to the point that SWBT's market power is constrained, or the Commission must develop remedies that prevent SWBT from exercising its market power.

Competition has not taken root in Missouri. The statistics bear this out. While SWBT estimates that the current level of competition in Missouri is around 6.4%, that figure is not accurate because of inaccurate use of 911 listing data.¹⁰⁹ If data as to number of loops and actual traffic flow is used, the level of competition is actually less than 1%.¹¹⁰ The Missouri PSC staff lamented that it is disappointed over the lack of residential customers being served over unbundled network elements, and that the level of local competition occurring in Missouri is disappointing.¹¹¹ There can be no dispute that, as of the moment, there is no economically significant competition such that SWBT's market power is constrained. There can be no dispute that, as of the moment, there is no economically significant competition such that SWBT's market power is constrained.

It is also clear that SWBT is largely to blame for this lack of development of competition. For instance, the nonrecurring charges set in the arbitrations, which SWBT reduced because they were too high, would actually have been even higher if SWBT's proposed NRCs were approved. The PSC reduced the NRCs by 50% based on, among other things, flaws in SWBT's data and

¹⁰⁸ This is particularly true in regard to this application where SWBT relies on the M2A as a proxy for checklist compliance instead of demonstrating that the Missouri market is open to competition.

¹⁰⁹ Tr. at 2293 -- 2298.

¹¹⁰ Tr. at 2296-2297.

¹¹¹ MO PSC Case No. TO-99-227, Staff's Response Comments to October Question and Answer Session and to Interim Consultant Report at 7 (October 26, 2000); Affidavit of William L. Voight at ¶ 24 (October 26, 2000).

double-counting of labor costs.¹¹² In addition, SWBT's use of ICB pricing for collocation, and the exorbitant collocation rates it produced, created a barrier to entry for CLECs wishing to enter or expand their markets. Likewise, the high loop conditioning rates SWBT charged made it virtually impossible for a CLEC to serve Missouri customers at locations more than 12,000 feet from the applicable central office. This created another barrier to entry for CLECs seeking to provide xDSL service.

There is no guarantee, even with the use of interim Texas rates and rate reductions, that the situation will improve. One, SWBT was not willing to offer these new rates, and only did so as a "quid pro quo" for approval of its application. The original M2A that it proposed, as we demonstrated above, contained some rates even higher than rates set by the Missouri PSC, and included many rates that were never evaluated by the PSC. Two, many of the "interim" rates are being reevaluated in pending proceedings before the Missouri PSC, and SWBT is seeking approval of rates significantly higher than the rates in its current M2A. If approved, these new rates will be immediately replace the interim rates, and CLECs will have to true-up any difference. Thus, any respite that the M2A rates may provide will be only temporary.

SWBT has impeded the development of competition through other means as well. It is anticipated that many CLECs will document in their comments the problems that existed in regard to Missouri Metropolitan Calling Area Plan ("MCA"). The MCA is a two-way interexchange, geographically defined, calling service, which is charged on a flat rate. The result is the creation of various calling scopes that give MCA plan subscribers the ability to make toll-free calls in the metropolitan areas of St. Louis, Kansas City and Springfield on a greatly-expanded basis. Clearly CLECs will need to be able to offer their subscribers access to such a

¹¹² *Staff's November Comments* at 22, n. 44.

service to compete effectively with SWBT. Without such a plan, CLEC subscribers would have to pay toll charges and dial ten digits on calls that SWBT customers would get toll-free and dial with seven digits.

The Missouri PSC, recognizing the importance of such a plan, required that all LECs within the geographic scope of the MCA be allowed to participate in the MCA.¹¹³ SWBT, however, began programming its switches to screen CLEC calls so that CLEC subscribers were effectively not allowed to participate in the MCA plan. SWBT did allow CLECs that resold SWBT's service or used UNE-P to participate in the plan. SWBT then attempted to impose a 2.6 cent MCA surcharge on CLECs, and did not seek the approval of the Missouri PSC on this charge. The Missouri PSC subsequently found that SWBT had acted improperly in screening the CLEC calls and imposing the surcharge. These practices, however, substantially impeded the ability of CLECs to provide facilities-based competition in the MCA areas.

Competition clearly has not taken root in Missouri, and the future of competition looks equally bleak. For these reasons, the Commenters urge that even if the Commission finds the M2A to comply with the checklist, it should deny SWBT's application until SWBT can show that its promises of performance in the M2A do come to fruition.

As the Office of Public Counsel noted:

If you get a M2A, you approve that, what do you have? You just have a document a promise to perform. Unless you see it in action, I don't think it complies with the law. That my point of view. I think it's always been [that] the law is [based on] performance, not promise.¹¹⁴

¹¹³ MO PSC Case No. TO-92-306, Report and Order (1993).


¹¹⁴ *Staff's August Comments* citing Tr. at 3104-3105.

Clearly the Missouri PSC had deep concerns about SWBT's pricing in Missouri in February 2001, and felt that the pricing was not in compliance with the FCC's requirements. Otherwise, it would not have made the findings it did, and sought the modifications it did. These infirmities, many of which date back years, cannot be cured in a couple of months. If the Commission sanctions SWBT's application, in all likelihood, we will have a scenario of years of high rates, an oasis period of interim reasonable rates, and then a return back to high rates with true-up to those rates. This is not a way to promote viable and permanent competition. Accordingly, it would be in the public interest for the Commission to defer granting approval until the M2A is actually shown to promote the level of competition that is currently sorely lacking in Missouri.

V. CONCLUSION

For the foregoing reasons, El Paso Networks, LLC and PacWest Telecom, Inc. urge the Commission to deny SBC's Application for Provision of In-Region InterLATA Services in Missouri.

Respectfully submitted,



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Dated: April 24, 2001

CERTIFICATE OF SERVICE

I, Deborah A. Walker, hereby certify that on April 24, 2001, I caused to be served upon the following individuals the Comments of El Paso Networks, LLC and Pacwest Telecom, Inc. in CC Docket No. 01-88:

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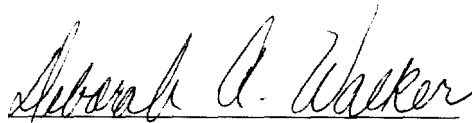
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